Nos. 02-1238; 02-1386; 02-1405

Supreme Court, U.S.
FILED
MAY 23 2003
OFFICE OF THE CLERK

In the
SUPREME COURT OF THE UNITED STATES

Attorney General State of Missouri,
Petitioner,

v.

Missouri Municipal League, *et al.*
Respondents,

Federal Communications Commission
and the United States of America,
Petitioners,

v.

Missouri Municipal League, *et al.*
Respondents,

Southwestern Bell Telephone Company,
Petitioner,

v.

Missouri Municipal League, *et al.*
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CITY OF ABILENE, TEXAS AND TEXAS COALITION OF CITIES FOR UTILITY ISSUES BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND FOR AFFIRMANCE

Steven A. Porter
Texas State Bar No. 16150700

Georgia N. Crump
Texas State Bar No. 05185500

Lloyd, Gosselink, Blevins, Rochelle,
Baldwin & Townsend, P.C.
P. O. Box 1725
Austin, Texas 78767
(512) 322-5800
(512) 472-0532 (Fax)
Counsel for *Amici Curiae*

May 23, 2003

Nos. 02-1238; 02-1386; 02-1405

In the
SUPREME COURT OF THE UNITED STATES

Attorney General State of Missouri,
Petitioner,

v.

Missouri Municipal League, *et al.*
Respondents,

Federal Communications Commission
and the United States of America,
Petitioners,

v.

Missouri Municipal League, *et al.*
Respondents,

Southwestern Bell Telephone Company,
Petitioner,

v.

Missouri Municipal League, *et al.*
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CITY OF ABILENE, TEXAS AND TEXAS COALITION OF CITIES FOR UTILITY ISSUES BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND FOR AFFIRMANCE

Steven A. Porter
Texas State Bar No. 16150700

Georgia N. Crump
Texas State Bar No. 05185500

Lloyd, Gosselink, Blevins, Rochelle,
Baldwin & Townsend, P.C.
P. O. Box 1725
Austin, Texas 78767
(512) 322-5800
(512) 472-0532 (Fax)
Counsel for *Amici Curiae*

May 23, 2003

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

INTEREST OF *AMICI CURIAE*.....1

ARGUMENT.....1

1. THE PETITIONS FOR WRIT OF CERTIORARI SHOULD BE GRANTED.....2
2. THE EIGHTH CIRCUIT'S OPINION SHOULD BE AFFIRMED.....3

CONCLUSION.....4

TABLE OF AUTHORITIES

CASES

City of Abilene, Texas v. Federal Communications Commission, 164 F.3d 49 (D.C. Cir. 1999).....1, 2

STATUTES

47 U.S.C. § 253(c).....2

OTHER AUTHORITIES

The Public Utility Commission of Texas, The Competition Policy Institute, Intelcom Group (USA), Inc., and ICG Telecom Group, Inc., AT&T Corp., MCI Telecommunications Corporation, and MFS Communications Co., Inc., Teleport Communications Group, Inc., City of Abilene, Texas Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, CCBPol 96-13, 96-14, 96-16, 96-19,
Reply Comments of City of Abilene, Texas (filed October 21, 1996).....3

The Public Utility Commission of Texas, The Competition Policy Institute, Intelcom Group (USA), Inc., and ICG Telecom Group, Inc., AT&T Corp., MCI Telecommunications Corporation, and MFS Communications Co., Inc., Teleport Communications Group, Inc., City of Abilene, Texas Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, CCBPol 96-13, 96-14, 96-16, 96-19,
Comments of City of Garland, Texas in Support of Petition of City of Abilene, Texas for Expedited Declaratory Ruling (filed October 10, 1996).....3

The Public Utility Commission of Texas, The Competition Policy Institute, Intelcom Group (USA), Inc., and ICG Telecom Group, Inc., AT&T Corp., MCI Telecommunications Corporation, and MFS Communications Co., Inc., Teleport Communications Group, Inc., City of Abilene, Texas Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, CCBPol 96-13, 96-14, 96-16, 96-19,
Comments of the Cities of La Grange, Texas, Brenham, Texas, Georgetown, Texas, and Fredericksburg, Texas (filed July 3, 1996).....3

Op. Tex. Att'y Gen. No. DM-391 (1996).....3

CITY OF ABILENE, TEXAS AND TEXAS COALITION OF CITIES FOR UTILITY ISSUES BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND FOR AFFIRMANCE

The City of Abilene, Texas ("Abilene" or "City") and the Texas Coalition of Cities for Utility Issues ("TCCFUI") (together "*Amici*") respectfully submit this Brief *Amici Curiae* in support of petitioners' request for review.[1] Upon review, Abilene and TCCFUI urge affirmation of the Eighth Circuit's decision.

INTEREST OF *AMICI CURIAE*

The City of Abilene, Texas is a "home rule city" under the Constitution and laws of the State of Texas with a population of approximately 116,000. Abilene is located 120 miles west of Fort Worth, Texas, the closest major metropolitan area. It is Abilene's August 15, 1996, petition for preemption to the Federal Communications Commission ("FCC" or "Commission") which is the subject of *City of Abilene, Texas v. Federal Communications Commission*, 164 F.3d 49 (D.C. Cir. 1999). Accordingly, Abilene offers first hand experience in how the D.C. Circuit's opinion thwarts Congress' determination that the nation's telecommunications needs are best served through competition. Abilene's interest is, and always has been, to ensure that its citizens and businesses have access to technologically advanced telecommunications services.

TCCFUI[2] is a coalition of approximately 110 Texas municipalities dedicated to protecting and supporting the interests of the citizens and cities of Texas with regard to utility issues. The coalition is comprised of large municipalities and rural villages. TCCFUI monitors the activities of the Texas Legislature, the Public Utility Commission, the Railroad Commission, and the

---

[1] No person or entity other than *Amici* have made a monetary contribution to the preparation or submission of this brief. Petitioners and respondents have consented to the filing of this brief and the letters of consent have been filed with the Clerk of the Court.

[2] A list of TCCFUI's member Cities is found on Attachment A.

Federal Communications Commission on utility issues of importance to cities. One of the principal purposes of TCCFUI is to ensure that the citizens of Texas enjoy quality utility service, including telecommunications services. Members of TCCFUI compete nationally and internationally for business development. TCCFUI supports the efforts of Abilene and similarly situated municipalities to bring the benefits of competition in the telecommunications arena to smaller cities and towns.

ARGUMENT

1. The Petitions For Writ Of Certiorari Should Be Granted

It is undeniable that the decisions of the D.C. Circuit and the Eighth Circuit are in clear conflict. The legal ramifications of this split in decisions have been briefed by Petitioners and will not be repeated here. In addition, Petitioners adequately outline the problems attributed to this conflict that impact the states, private companies, and the FCC.

Municipalities, too, are adversely impacted by the conflicting opinions. From the perspective of municipalities in Texas, the current state of the law is untenable. Missouri's prohibition against municipalities engaging in telecommunications services has been preempted, while Texas' blanket ban, which even prevents municipal contracts with private telecommunications companies, remains in effect. The availability of modern telecommunications services is essential to the provision of municipal services and to the economic viability of a community. States and municipalities often compete fiercely with each other for industry and business. Business location decisions may be determined by whether there exists an up-to-date telecommunications infrastructure and by the quality of the local educational system. The educational system of the community may be judged on whether enhanced telecommunications services are available in the schools.

Cities and towns in Missouri and other states in the Eighth Circuit are free to take steps to upgrade infrastructure, contract with private companies, and generally foster telecommunications competition as Congress intended. Meanwhile, Texas law remains a barrier to telecommunications competition in Texas' cities, especially those located in sparsely populated areas of the state.

The conflict in preemption decisions has produced an unlevel playing field as municipalities endeavor to attract business and increase commerce. The preemption of state laws barring municipalities from ensuring advanced telecommunications services should not depend upon geography. Such statutes should be uniformly preempted.

The conflict of decisions on this issue promotes forum shopping, creates confusion for the federal agency charged with implementing Congress' telecommunications policy, and ensures a competitive advantage to those municipalities located in states where bans to participation have been preempted. Certainly, Congress intended that national telecommunications policy be uniformly implemented. The Eighth Circuit's interpretation that municipalities are included in the phrase "any entity" has the effect of promoting competition as Congress no doubt intended. The D.C. Circuit's narrow view that "any entity" means "private entity" erects an impassable roadblock to competition. Only one of the circuit courts is correct and will accomplish the goals of Congress. How much longer must the smaller, rural towns and their citizens be denied the opportunity to enjoy the benefits of telecommunications competition? *Amici* urge the Court to grant the petitions and review the decision of the Eighth Circuit.

2. The Eighth Circuit's Opinion Should Be Affirmed

Amici's agreement with Petitioners ends with the proposition that the Court should review the decision of the Eighth Circuit. Unlike Petitioners, *Amici* urge the Court to affirm the Eighth Circuit's opinion. Those entities that suggest the D.C. Circuit's decision denying preemption of Texas law is the "better view" are badly mistaken. The D.C. Circuit erroneously focused on Congress' "tone of voice" when interpreting 47 U.S.C. § 253(c).[3] The D.C. Circuit's interpretation of "any entity" disregards the plain meaning of the language used by Congress, fails to account for the fundamental intent of Congress to promote competition and ignores the role municipalities are willing to take to fill the gap in the provision of competitive telecommunications

[3] *City of Abilene v. FCC*; 164 F.3d 49, 52.

services.[4] The D.C. Circuit's opinion has resulted, as predicted, in depriving smaller, rural communities of the benefits of competition in the telecommunications arena.

A case in point is the situation of the City of Abilene, a community whose economic growth and vitality have been diminished by the D.C. Circuit's opinion. In 1996 the Mayor's Task Force on Technology was formed in Abilene to explore the technological needs of Abilene. It was a broadly based committee comprised of citizens, civic organizations and businesses. The mission of the Task Force was "[t]o assure Abilene's place on the Information Superhighway."[5] As a result of the work of the Mayor's Task Force, Abilene viewed the construction of modern telecommunications infrastructure as a pathway to the City's economic vitality, similar to the manner in which highways and roads in the past were considered the cornerstone for economic growth of a city. Abilene had a vision to "enrich the lives of all area citizens, businesses, governmental entities and schools by empowering them to use worldwide knowledge bases."[6] Abilene's plan to upgrade the telecommunications infrastructure was to benefit schools, libraries, healthcare facilities and businesses.

However, plans to achieve the vision and goals of the Task Force were stopped dead in their tracks when the local exchange monopoly, Southwestern Bell Telephone Company ("SWBT"), informed the City that it was unwilling to make the investments in its system to meet such goals. On August 15, 1996, Abilene petitioned the FCC for preemption of Texas' law prohibiting municipalities from filling in the gap and providing and/or contracting for telecommunications services.[7]

---

[4] The FCC conceded that "municipal entry can bring significant benefits by making additional facilities available for the provision of competitive services." FCC Petition at 4.

[5] Report of Mayor's Task Force on Technology, September 26, 1996.

[6] *Id.*

[7] At the time it was considering Abilene's petition, the FCC also had before it the petition of ICG Access Services, a provider of telecommunications services. The City of San Antonio, Texas had entered into a contract with ICG to jointly construct and operate a telecommunications network. The Texas Attorney General, however, determined that such government/private sector cooperation violated Texas law. *See,* Op. Tex. Att'y Gen. No. DM-391 (1996). The Texas

At the FCC, Abilene predicted in its comments that without preemption of Texas' total ban on municipalities' offering telecommunications services, "less densely populated areas will never see the benefits of competition."[8] No crystal ball was needed for such prediction, only a little history lesson learned from the electric industry's course of conduct in Texas. Approximately 75 rural electric cooperatives were established in Texas because the for-profit electric companies declined to serve sparsely populated areas of the state. History has repeated itself as SWBT and other carriers have decided over the years to invest in the larger metropolitan areas where the profit margins are greater, leaving smaller, rural communities to fend for themselves.

It is telling that seven years after enactment of the Telecommunications Act of 1996, an outstanding question is whether ***all*** customers and businesses, even those located in less populous areas of Texas, will ***ever*** enjoy the benefits of competition that Congress surely intended. Abilene believed in 1996, and it believes today, that Congress meant to create an environment where telecommunications competition could flourish and that ***all*** citizens would benefit from such competition via investment in modern infrastructure. Abilene, and no doubt other

---

statute, then, prohibits a municipality from contracting with private companies for telecommunications services.

[8] *The Public Utility Commission of Texas, The Competition Policy Institute, Intelcom Group (USA), Inc., and ICG Telecom Group, Inc., AT&T Corp., MCI Telecommunications Corporation, and MFS Communications Co., Inc., Teleport Communications Group, Inc., City of Abilene, Texas Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, CCBPol 96-13, 96-14, 96-16, 96-19, Reply Comments of City of Abilene, Texas (filed October 21, 1996). The City of Garland, Texas, provided competitive electric service to its citizens and filed comments with the Commission concurring with Abilene's concerns. *See also, Id.* at *Comments of City of Garland, Texas in Support of Petition of City of Abilene, Texas for Expedited Declaratory Ruling*, (filed October 10, 1996). The Cities of LaGrange, Texas, Brenham, Texas, Georgetown, Texas, and Fredericksburg, Texas made similar predictions. *See also, Id.*, Comments filed July 3, 1996 ("these cities believe that the local exchange companies and the interexchange customers will focus most, if not all, of their marketing efforts in the areas with the largest populations and the highest probability of near term growth").

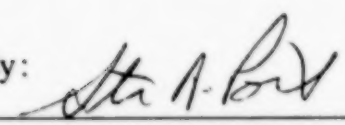
similarly situated cities, have been ready and willing to work with the private sector to include its citizens and businesses in the telecommunications revolution. The Texas statute, the FCC, and the D.C. Circuit have worked together to destroy Abilene's telecommunications vision and to deprive it and its citizens of the benefits of competition.

CONCLUSION

The petitions for writs of certiorari should be granted. The Eighth Circuit's opinion should be affirmed as the law of the land.

Respectfully submitted,

LLOYD, GOSSELINK, BLEVINS, ROCHELLE, BALDWIN & TOWNSEND, P.C.
P. O. Box 1725
Austin, Texas 78767
(512) 322-5800
(512) 472-0532 (Fax)

By: 

STEVEN A. PORTER
Texas State Bar No. 16150700

GEORGIA N. CRUMP
Texas State Bar No. 05185500

COUNSEL FOR *AMICI CURIAE*

Attachment A

Abernathy
Addison
Alamo
Allen
Andrews
Arlington
Austin
Balcones Heights
Belton
Big Spring
Bowie
Breckenridge
Brenham
Brookside Village
Brownfield
Brownwood
Buffalo
Burkburnett
Canyon
Carrollton
Cedar Hill
Center
Cisco
Clear Lake Shores
Cleburne
College Station
Conroe
Corpus Christi
Cottonwood Shores
Crockett
Dallas
Denison
Dickinson
El Lago
Electra
Fairview
Flower Mound
Fort Worth
Fredericksburg
Friendswood
Georgetown
Grand Prairie
Grapevine
Greenville
Gregory
Groves
Harlingen
Henrietta
Hewitt
Huntsville
Irving
Jacinto City
Jamaica Beach
Kilgore
LaGrange
La Joya
Lampasas
Lancaster
Laredo
League City
Levelland
Lewisville
Longview
Los Fresnos
McAllen
Mexia
Midlothian
Missouri City
Navasota
Nolanville
North Richland Hills
Palacios
Pampa
Paris
Pearsall
Plainview
Plano
Port Neches
Ralls
Refugio
Reno
Richardson
River Oaks

Rosenberg
San Marcos
San Saba
Selma
Seminole
Seymour
Smithville
Snyder
South Padre Island
Spearman
Stephenville
Sugar Land
Sunset Valley
Taylor Lake Village
Terrell
The Colony
Thompsons
Timpson
Town of Westlake
Trophy Club
Tyler
University Park
Victoria
Waxahachie
Webster